IN THE

Supreme Court of the United States

October Term, 1946.

No. 620.

TOM C. CLARK, ATTORNEY GENERAL, as successor to the Alien Property Custodian,

Petitioner,

vs.

ALFONSA ALLEN, GUELFO DE DOMINICIS, ULDEN PAGOZZI, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF THE ATTORNEY GENERAL OF CALIFORNIA, AS AMICUS CURIAE, IN SUPPORT OF RESPONDENTS' BRIEF.

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SUBJECT INDEX

	PAGE
Opinions below	1
Jurisdiction	1
Questions presented	2
Prefatory statement	2
Treaty and statutes involved	3
Summary of argument	3
Argument	8
I.	
Article IV of the Treaty of 1923 with Germany does not control in this case	8
II.	
Article IV of the Treaty of 1923 does not govern succession by German nationals to personal property of decedent Americans	14
III.	
The California statute is valid and does not invade the federal field of control over foreign relations	18
IV.	
The burden of proof of the existence of reciprocal rights is upon the custodian	22
Conclusion	25

TABLE OF AUTHORITIES CITED

CASES PAGE

Barnaby v. Barnaby, 100 Cal. App. 195 24
Cummings v. Deutsche Bank, 300 U. S. 115 ..... 5, 10, 11
Duus v. Brown, 245 U. S. 176 17
Frederickson v. Louisiana, 23 How. 445 ..... 16, 17
Hines v. Davidowitz, 312 U. S. 52 ..... 7, 20
Irving Trust Co. v. Day, 314 U. S. 556 ..... 4, 18, 20
Lyeth v. Hoey, 305 U. S. 188 19
Peterson v. Iowa, 245 U. S. 170 17
Skarderud v. Tax Commission, 245 U. S. 633 17
Society for the Propagation of the Gospel v. New Haven, 8 Wheat. 464, 21 U. S. 464 9
Sophie Rickmers, The, 45 F. (2d) 413 9
Techt v. Hughes, 229 N. Y. 222, 128 N. E. 185; cert. den. 254 U. S. 643 ..... 8, 9, 10, 11, 12
Terrace v. Thompson, 263 U. S. 197 19
Vanderbilt v. All Persons, 163 Cal. 507 23

STATUTES

Acts of Louisiana (1855), Act 315, Sec. 315, pp. 398, 399 17
California Code of Civil Procedure, Sec. 1855a 23
California Probate Code, Sec. 259 (Stats. 1941, Chap. 895) 3, 22, 24
California Probate Code, Sec. 259.1 (Stats. 1941, Chap. 895) 3, 22
California Probate Code, Sec. 259.2 (Stats. 1941, Chap. 895) 3, 22
California Probate Code, Sec. 259.2 (Stats. 1941, Chap. 895, p. 2135) 2, 3
California Probate Code, Sec. 259 (Stats. 1945, Chap. 1160) 3
California Statutes of 1945, Chap. 1160 22

PAGE

Joint Resolution of Congress, July 2, 1921 (42 Stat. 105, 106)..... 6, 11

Trading With the Enemy Act, Sec. 5(b), as amended by Sec. 301, Title III, First War Powers Act, 1941 (55 Stat. 839).... 3

Treaty of Berlin of 1921..... 6

Treaty of Friendship, Commerce and Consular Rights, Art. IV, signed Dec. 8, 1923, proclaimed Oct. 14, 1925 (44 Stat. 2132, 2135)..... 3

Treaty of 1783 With Sweden, Art. VI, (8 Stat. 346, 354)..... 17

Treaty of 1826 With Denmark, Art. VII (8 Stat. 340, 342).... 17

Treaty of 1827 With Norway, Art. XVII (8 Stat. 346, 354).... 17

Treaty of 1844 With Wurtemburg (8 Stat. 588, 590)..... 16

Treaty of 1899 With Great Britain (31 Stat. 1939)..... 17

Treaty of 1923 With Germany, Art. IV.....2, 5, 6, 8, 14, 17, 18

Treaty of 1928 With Prussia (8 Stat. 378, 384)..... 11

TEXTBOOK.

Hackworth, Digest of International Law (1943), VI., p. 327..... 11

INDEX TO APPENDICES.

PAGE

Appendix A. Article IV of the Treaty of Friendship, Commerce and Consular Rights, signed December 8, 1923, proclaimed October 14, 1925, 44 Stat. 2132, 2135 1

Appendix B. Section 259, 259.1 and 259.2 of the California Probate Code, as enacted by Chapter 895, California Statutes of 1941, effective July 1, 1941 2

Appendix C. Section 259 of the California Probate Code, as amended by Chapter 1160, California Statutes, 1945, effective September 15, 1945 3

Appendix D. Section 5(b) of the Trading With the Enemy Act, as amended by Section 301, Title III, First War Powers Act, 1941, 55 Stat. 839, 50 U. S. C., App., Supp. V, 5(b) 4

IN THE

Supreme Court of the United States

October Term, 1946.

No. 626.

TOM C. CLARK, ATTORNEY GENERAL, as successor to the Alien Property Custodian,

Petitioner,

vs.

ALVINA ALLEN, GERTRUDE DINWIDDIE, HILDA PIGOZZI, *et al.*,

Respondents.

BRIEF OF THE ATTORNEY GENERAL OF CALIFORNIA, AS AMICUS CURIAE, IN SUPPORT OF RESPONDENTS' BRIEF.

Opinions Below.

The opinion of the District Court [R. 15-21] is reported in 52 F. Supp. 650. The opinion of the Circuit Court of Appeals [R. 29-40] is reported in 156 F. (2d) 653.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on May 22, 1946 [R. 41]. A petition for amendment of the opinion was denied by an order entered on July 17, 1946 [R. 41]. On August 1, 1946, Mr. Chief Justice Vinson extended the time for filing a petition for a writ of certiorari until October 21, 1946. The petition for the writ was filed on October 18, 1946, and was

granted on December 9, 1946 [R. 42]. The jurisdiction of this Court rests upon Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented.

1. Whether Article IV of the Treaty of 1923 with Germany is controlling in this case, or whether by reason of the declaration of war with Germany and the provisions and employment of the Trading with the Enemy Act, as amended by the First War Power Act and implemented by Executive orders and rulings, any rights exist in the foreign heirs.

2. Whether, assuming the Treaty of 1923 was operative at the time of decedent's death, Article IV thereof governs succession by German nationals to personal property of decedent Americans.

3. Whether the California Statute is valid, apart from the treaty, and not subject to the charge that it invades the Federal field of control over foreign relations.

4. Whether the burden of proof as to reciprocal inheritance rights rests upon the Custodian.

Prefatory Statement.

The State of California has a real and substantial interest in the decision of the questions here presented. Not only is it interested in maintaining the integrity of its laws—it is also interested for the reason that in the event no reciprocal rights are found to exist, either as a result of the treaty or otherwise, and in those cases where there are no heirs or legatees resident here to take, the property would be disposed of as escheated property. (Sec. 259.2, California Probate Code, Stats. 1941, Ch. 895, p. 2135.) [Appendix B, hereto, p. 2.]

Treaty and Statutes Involved.

Article IV of the Treaty of Friendship, Commerce and Consular Rights, signed December 8, 1923, proclaimed October 14, 1925 (44 Stat. 2132, 2135). Sections 259, 259.1 and 259.2 of the California Probate Code (California Statutes 1941, Chapter 895) and Section 259 of said code, as amended (California Statutes 1945, Chapter 1160, effective September 15, 1945). Section 5(b) of the Trading with the Enemy Act, as amended by Section 301, Title III, First War Powers Act, 1941 (55 Stat. 839). These are printed in the Appendix hereto, pp. 1 to 4.

Summary of Argument.

The question here is whether the Alien Property Custodian[1] acquired anything when he vested whatever right, title and interest the German nationals named as beneficiaries in the will of decedent may have. Briefly stated it is —was there anything to vest? Neither the respondents nor the state have ever disputed the power of the Custodian under the Trading with the Enemy Act, as amended and implemented, to seize or vest the property of alien nationals in times of war or other emergency.

The state neither claims nor exercises any power over international affairs or foreign relationships. And that the war powers of the Federal Government, including the power to capture enemy property in time of war, are exclusive has never been questioned in any way. There is no controversy over these matters—but there *is* a divergence of view as to whether any property exists

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[1]Hereinafter the Alien Property Custodian will be referred to as the "Custodian," the resident heirs as "Respondents" and the *Amicus Curiae* as the "State."

in this case which is subject to the exercise of these powers.

Here a resident of California died leaving her property, situate in that state, to four heirs-at-law, all residents and nationals of Germany. Before property thereby came into being which was subject to seizure or vesting the testator must have had the right to so dispose and the legatees to inherit or take. This depended in the first instance upon whether such rights were vouchsafed by treaty between this nation and Germany, and in turn whether if there was such a treaty it was effective at the time of her death. In the absence of any operative treaty provision—which would admittedly constitute the supreme law of the land—this depended in the second instance upon whether under the laws of California the property could so pass, and this in turn upon whether the laws of that state are free from offense to the Federal Constitution.

It is our position that the California statute, legislating in a field where it admittedly can "limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction,"[2] has validly denied the right to nonresident aliens to inherit property in that state in the absence of the existence of reciprocal rights to American citizens in the country of the alien's residence, and that this statute is fully operative, not being in conflict with any treaty in effect at the date of death of the decedent here, and not infringing upon the field of foreign affairs reserved to the Federal Government.

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[2] *Irving Trust Co. v. Day*, 314 U. S. 556, 562.

I.

It does not become necessary to declare a wholesale abrogation of the Treaty of 1923 with Germany as a result of the declaration and state of war with that nation prior to and at the time of the death of decedent. However, by the acts of Congress and those of other departments of the Federal Government, which were in direct and positive conflict with the provisions of Article IV of that treaty, these provisions were rendered wholly inoperative and without effect. It is futile to say that these provisions may be considered as having enjoyed continued existence during the war, as being "compatible with the state of hostilities." Not only were the agents of the Government empowered to seize all property of German subjects, this Court has held that upon such seizure the alien enemy owners were divested of every right, and the title acquired by the United States was absolute.[3] Any leniency or forbearance was rendered solely a matter of grace, not of right. The First War Powers Act of 1941, amending the Trading with the Enemy Act, conferred such broad powers and so implemented the seizure of property of foreign nationals that it is impossible to reconcile it with a purpose to give further recognition to such rights as were set forth in the treaty. To say that Congress did not, by specific mention of the treaty, express an avowed intent to repudiate it is not enough. Actions speak louder than words. The political action of this nation and a continued recognition of the treaty became wholly inconsistent and irreconcilable. The two were incompatible. Furthermore, the treatment accorded

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[3] *Cummings v. Deutsche Bank*, 300 U. S. 115, 120.

the subject of reciprocal inheritance rights after World War I, preceding which the Treaty with Prussia had contained practically the same provisions as the Treaty of 1923,[4] convincingly demonstrate that the parties to the Treaty of 1923 held no illusions that its almost identical provisions would remain effective or control in the event of another war.

II.

The plain language of paragraph two of Article IV of the Treaty, relating to "personal property of every kind within the territories of the other," confers the right upon a national to dispose of his personal property situate in the country of the other nation, and any of his heirs or legatees may succeed thereto, but no right is given to heirs or legatees who are nationals of the nation of which the person disposing of his personal property is *not* a national to take personal property in the nation of which such person *is* a national. Thus complete reciprocity of inheritance rights is not conferred.

III.

The California statute is not subject to the charge that it invades the exclusively Federal field of control over foreign relations. It is purely and simply an inheritance statute, prescribing rules as to the circumstances under which aliens not residing within the United States may take property in California by succession or testamentary disposition. This Court has held that a state may limit, condition or abolish this right altogether. It has never

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[4] Joint Resolution of Congress of July 2, 1921 (40 Stat. 106) and Treaty of Berlin of 1921 ratifying the same.

been disputed that this right is subordinate to the treaty-making power of the Federal Government. The California statute, by making reciprocal rights of inheritance its base, predicates its rule upon the treaty provisions made by the Federal Government. As the Federal Government claims no right, apart from the treaty-making power, to legislate for the states on this subject, there is no other way in which this can be regulated. No trespass in the field of foreign relations results. The situation is entirely different from that where both Federal and state governments have concurrent powers to legislate upon a subject.[5] In such a case, where the Federal Government occupies the entire field or where the state statute violates a policy promulgated by Congress, the state statute must yield. Here the state statute defers to and recognizes all treaty provisions, as it must. To say that the state indirectly becomes a seeker for corresponding rights among other nations is to attempt to impute an unwarranted and unduly strained motive and effect to the exercise of what has been consistently recognized as the state's legislative power.

IV.

As for the change in the burden of proof which the amended statute of 1945 prescribed, neither was the amendment in question entirely procedural, as distinguished from one affecting substantive rights, so as to render applicable the rule contended for by petitioner, nor does the present status of the instant case permit of its being invoked at this stage.

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[5] *Cf. Hines v. Davidowitz*, 312 U. S. 52.

ARGUMENT.

I.

Article IV of the Treaty of 1923 With Germany Does Not Control in This Case.

Petitioner bases his primary reliance upon the claim that the Treaty of 1923 with Germany remained in effect after the outbreak of war, and was operative on the date of death of the testatrix in this case, viz., June 6, 1942. If it did, the designated legatees, resident in and nationals of Germany, would benefit by whatever rights were therein conferred and the Custodian, standing in their shoes, would take whatever interest they acquire. It is the contention of the respondents and the State that the decision of the Circuit Court was sound and that Article IV of the treaty had been shorn of all vitality and was entirely without effect on the date in question.

We think it unnecessary to explore at length the highly speculative field of the effect of war upon treaties. The subject has been treated extensively in both the brief of petitioner and that of the respondents. It was well stated by Judge Cardozo in a case[6] repeatedly referred to by petitioner that "The effect of war upon the existing treaties of belligerents is one of the unsettled problems of the law." He also said that "No one can study the vague and wavering statements of treaties and decision in this field of international law with any feeling of assurance at the end and that he has chosen the right path." Some writers have expressed the view that war of necessity annuls and terminates all treaties, others that war obliter-

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[6] *Techt v. Hughes*, 229 N. Y. 222, 128 N. E. 185, at 191, 193, certiorari denied 254 U. S. 643.

ates none, still others that war suspends their operation. As to such matters as rules for conduct during a war and international boundaries it may be said that they survive the outbreak of war. A generally accepted view is that war does not abrogate a treaty in its entirety, but only those portions which are incompatible with a state of war.[7] It would be wellnigh impossible to collate, and attempt to reconcile the varying expressions upon this subject. Of this, however, we are all aware—that the last World War was *total* war, and it must be realistically acknowledged that it penetrated every field of human conduct and activity. We cannot ignore the very real effect it had on treaties entered into during a time of peace.

Petitioner lays great stress upon the scholarly opinion of Judge Cardozo in *Techt v. Hughes* (1920), 229 N. Y. 222, 128 N. E. 185, certiorari denied 254 U. S. 643. The case is well-known and has been analyzed in the briefs of both petitioner and respondent. What the decision did was to allow inheritance by a resident of this nation who had married a citizen of Autria-Hungary (resident in the United States), thereby losing her citizenship here. She was loyal, peaceful and as an "enemy" alien she in no way jeopardized our country's war effort. Thus a serious hardship to an American woman, resident here, who had changed her nationality by marriage was prevented. However, the opinion then proceeded to express dictum, predicated upon the assumption that the plaintiff was a non-resident. We submit that this portion of the opinion cannot be deemed persuasive here. It stated that "Custody

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[7] *Society for the Propagation of the Gospel v. New Haven*; 8 Wheaton 464, 21 U. S. 464.

The Sophie Rickmers, 45 F. (2d) 413 (S. D. N. Y.).

would be assumed by the alien property custodian" and that "Title, however, would be unchanged. . . ." (128 N. E. at 192.) This is sharply at variance with what this Court later held in *Cummings v. Deutsche Bank* (1936), 300 U. S. 115, 120, 57 S. Ct. 359, 362:

> "Alien enemy owners were divested of every right in respect of money and property seized and held by the Custodian under the Trading with the Enemy Act. (Citing cases.) The title acquired by the United States was absolute and unaffected by definition of duties and limitations upon the power of the Custodian or the Treasurer of the United States. . . . As the taking left in enemy owners no beneficial right to, or interest in, the property, the United States did not take or hold as trustee for their benefit."

In petitioner's brief no mention is made of the fact that the Custodian did not at any time during World War I vest any rights growing out of the treaty with Austria-Hungary, the treaty in question in *Techt v. Hughes, supra*. It may be assumed that he followed the advice of the then Secretary of State to the effect that the provisions of that treaty were not regarded as being in operation.[8]

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[8] "The Secretary of State to the Alien Property Custodian (Palmer)

"Washington, September 10, 1918

"Sir: The Department acknowledges the receipt of your letter of August 30, 1918, in which you state that the question has arisen as to the present effectiveness of the treaties with Austria-Hungary and the various state composing the Germany Empire, 'which permits subjects of those states to take or hold real property in the United States', and request that the Department indicates the attitude it is disposed to adopt in regard to these treaties.

"The Department assumes that you refer to the provisions in Article 2 of the convention of 1848 with Austria-Hungary * * * and to the somewhat similar provisions in article 14 of the con-

The incongruity of attempting to effect a continuity of the Treaty of 1923 through the hostilities of World War II is, we believe, convincingly demonstrated in the decision of the Circuit Court in this case. Prior to World War I we had provisions in a treaty with Prussia[9] which conformed substantially to those of the Treaty of 1923 with Germany. Following World War I, while still in a state of war with Germany, Congress (July 2, 1921) passed a joint resolution (42 Stat. 105, 106) providing that property of German nationals seized or held by the United States on or after April 16, 1917, should be retained until disposed of by law. The Treaty of Berlin of 1921 expressly ratified and adopted the provisions of this joint resolution. In 1936 this Court held[10] that by reason of World War I, the joint resolution of Congress of July 2, 1921, and the Treaty of Berlin ratifying the resolutions

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vention of 1828 with Prussia, to article 2 of the convention of 1845 with Bavaria, and to similar articles in conventions with other states of the German Empire which were regarded in force on the dates of our entrance into a state of war with Austria-Hungary and Germany, respectively.

"In reply to your inquiry as to the present effectiveness of these provisions of the treaties with Austria-Hungary and the various states composing the German Empire, you are informed that as to Austria-Hungary and Germany, the Department does not regard these provisions as now in operation.

"In this relation it may be pointed out that in the absence of applicable treaty provisions the right of an alien to take or hold real property by descent or purchase, or otherwise, in the United States, would, it appears, depend upon the law of the State or Territory in which the property may be situated.

"I am (etc.)

ROBERT LANSING".

For. Re. Supp. 2 (1918) p. 309; cited in VL. Hackworth, *Digest of International Law* (1943), p. 327, as contra to the dictum in *Techt v. Hughes*, *supra*.

[9]Treaty of 1928 with Prussia, 8 Stat. 378, 384.

[10]*Cummings v. Deutsche Bank*, 300 U. S. 115, 57 S. Ct. 359.

and the seizure of enemy property, the United States had become the absolute owner of this property. Thus, we think, the effect of the treaty with Prussia was determined to the clear understanding of all—and when the Treaty of 1923 was entered into it unquestionably was with full knowledge of what resulted from the former like treaty.

Judge Cardoza held in the *Techt* case (128 N. E. at 193) that "until the political departments have acted, the courts, in refusing to give effect to treaties, should limit their refusal to the needs of the occasion." We think the political departments of the Government have here acted, and as to the property rights here involved the treaty provisions were repudiated and annulled—not necessarily by a state of war but by the Act of Congress and its effect as determined by this Court.

The same eventualities occurred in World War II. The Trading with the Enemy Act was further enforced by the First War Powers Act and implemented by executive directives and orders. Can it be said that there could have been any naive failure to understand the import or effect of the acts taken? Or can it be said that Germany had any illusions as to the survival of the 1923 treaty in the event of another conflict?

It is suggested by petitioner that the vesting power and its exercise do not disturb the alien's right to inherit (Pet. Br. pp. 18-20); that because certain movements of an heir might be licensed and the Custodian is authorized to represent the heir in legal proceedings, provision might be made for the enforcement of this right. The realistic answer is that nothing more than an empty shell could remain. The effect of vesting, as determined by this Court, has been shown. That the Custodian may not vest

in every case is beside the point. He might not even discover the facts in many instances. The test is not what is done but what can be done under the statute. As pointed out by the Circuit Court [R. 36, 37] numerous restrictions were imposed upon German nationals directly in conflict with the enjoyment of any rights which might have resulted from the treaty. The contention that rights of German nationals could be asserted suggests the nursery rhyme in which the daughter who asked her mother if she could go out to swim received an affirmative reply—but with the qualification that although she could hang her clothes on a hickory limb, she could not go near the water.

To urge the view that despite what eventuated following World War I and despite the greater implementation and enforcement of the Trading with the Enemy Act during World War II, the treaty provisions still remained effective and were to be regarded as operative, is to urge that all realism be abandoned. The treaty as it pertained to this subject became a dead letter. It was without effect on the date here involved.

This does not mean that such rights as were provided by the terms of the treaty may not again be set up. Upon the termination of war, nations are free to make entirely new contractual relationships. Former provisions may be reenacted or reestablished. But, we submit, they are thus treated as being *revived* rather than as having *survived* during the period of war.

We submit that the Treaty of 1923 with Germany was ineffective on June 6, 1942, and had no application in this case.

II.

Article IV of the Treaty of 1923 Does Not Govern Succession by German Nationals to Personal Property of Decedent Americans.

It is our contention that even had the Treaty of 1923 with Germany remained in effect, the provisions thereof do not confer any rights upon German nationals to succeed to a deceased American's personal property in this country.

While the *first* paragraph of Article IV of the Treaty of 1923, which relates to "real or other immovable property," employs the broad term "any person" in referring to the decedent, the *second* paragraph, relating to "personal property of every kind," contains an entirely different designation and provision. It reads as follows:

> "Nationals of either High Contracting Party may have full power to dispose of their personal property of every kind within the territories of the other, by testament, donation or otherwise, and their heirs, legatees and donees of whatsoever nationality, whether resident or non-resident, shall succeed to such personal property, and may take possession thereof, either by themselves or by others acting for them, and retain or dispose of the same at their pleasure subject to the payment of such duties or charges only as the nationals of the High Contracting Party within whose territories such property may be or belong shall be liable to pay in like cases."

In the first place this provision is limited to "nationals," rather than applying to "any person." In the second place it defines the personal property which the national is given the right to dispose of in the manner provided, as that within the territory of the other. In the third place the personal property which the heirs, legatees and

donees are authorized to take can only be that which the national is empowered to dispose of. This is by reason of the designation thereof as "*such* personal property."

The plain meaning of the provision is that it (1) gives a national the right to dispose of his personal property which is situate in the other nation, and (2) gives his heirs, wherever resident and of whatever nationality, the right to take and dispose of that property, subject to such duties or charges as nationals of the country in which the property may be, would have to pay. This is the extent to which it goes. Petitioner agrees (Pet. Br. p. 35) that the provision does not relate to the right of a national to dispose of his personal property which is in his own country, since nationals naturally have that right without treaty provision. But as to the second clause, that which provides that the heirs of the national may take that property of his which is described in the first clause, petitioner seeks to invoke a construction which would give to the heirs of the national rights to property of the national which is not the subject of the first clause. In other words, he would so read the clause as to make it mean that heirs of German nationality and resident in Germany, could not only succeed to personal property of an American national which is in Germany, but to that which is in America as well.

However, we think it plain that the language employed says something else, and that an attempt is thus made to make it mean something it does not say. What it says, in plain words, is that the right of succession applies to "*such*" personal property, namely, that personal property of the national which is within the territory of the other nation. Had the intent been that sought to be imputed by petitioner, it would have been a simple matter to so provide.

The qualifying phrase "within the territories of the other" could readily have been omitted from the first clause—and it could have been added as a phrase modifying the words "personal property" in the second. This would have given an entirely different import, however. As it stands, "such personal property" refers to the personal property of a national which is within the territory of the nation of which he is not a national.

Petitioner states that two clauses were employed because provision was required for both the right of an alien to dispose of his property and the right to inherit his property. (Pet. Br. p. 34.) This being so, if the meaning contended for by petitioner had been intended the *droit d' aubaine* and the *droit de detraction* could readily have been treated in two entirely separate statements. The fact that provision as to both was made in one inclusive statement, with interlocking reference as to the qualifying phrase of definition, is, we believe, indication of an intent to specifically restrict the scope.

A substantial portion of petitioner's brief (Pet. Br. pp. 32-67) is devoted to reference to similar clauses which have been employed in treaties in the past. His contention is that it was the intent of these treaties to create reciprocity of inheritance in respect of personal property regardless of the nationality of the decedent. There is no inclination on our part to question any of the historical data so painstakingly presented by petitioner.

It is conceded by petitioner, however (Pet. Br. p. 38), that a construction contrary to the one suggested by him was adopted by this Court in *Frederickson v. Louisiana*, 23 How. 445, in which the Treaty of 1844 with Wurtemberg (8 Stat. 588, 590) was passed upon. In that case the testator was a citizen of the United States and his

cousins were citizens and residents of Wurtemberg. A succession tax of 10 per cent on legatees not domiciled in the United States was imposed by the Louisiana statute. (Sec. 7, Act 315, 1855, Acts La., pp. 398, 399.) The treaty provision involved was almost identical with Art. IV of the Treaty of 1923 with Germany. In passing upon the question as to whether the Treaty of 1844 with Wurtemburg prevented application of the tax to the alien legatees this Court held that the treaty was inapplicable to estates of citizens residing at home.

Three decisions of this Court have followed the holding in *Frederickson v. Louisiana, supra.*

Skarderud v. Tax Commission, 245 U. S. 633 (1917), involving Art. XVII, Treaty of 1827 with Norway (8 Stat. 346, 354);

Peterson v. Iowa, 245 U. S. 170 (1917), involving Art. VII, Treaty of 1826 with Denmark (8 Stat. 340, 342);

Duus v. Brown, 245 U. S. 176 (1917), involving Art. VI, Treaty of 1783 with Sweden (8 Stat. 346, 354).

There has been no later expression by this Court upon the question presented in the above cases.

It is petitioner's position that the *Frederickson v. Louisiana* decision is not to be followed here because the Court did not have before it the historical data presented by him relative to the treaty clause in question. However that may be, it remains to be explained why the Treaty of 1899 with Great Britain (31 Stat. 1939) or the Treaty of 1923 with Germany should have thereafter followed substantially the former language on this subject. While there may be no presumption as to knowledge, it would seem strange indeed for the treaty-making agencies of

our government to be unaware of the decisions of the Supreme Court in this field.

If petitioner's contentions as to the construction of Article IV of the Treaty of 1923 with Germany are not accepted, it naturally follows that reciprocity of inheritance rights as to personal property was not provided by the treaty. We submit that such was the result.

III.

The California Statute Is Valid and Does Not Invade the Federal Field of Control Over Foreign Relations.

The custodian contends that the California statute is "invalid as an invasion of the Federal field of control over foreign affairs." He speaks of the state's "seeking to promote the right of American citizens to inherit abroad by offering to aliens reciprocal rights of inheritance in California," and characterizes the statute as an "invitation to foreign countries to trade inheritance rights abroad for inheritance rights here." (Pet. Br. p. 69.)

We think that a correct analysis of the statute and its effect will demonstrate that by its provisions the state becomes neither a promoter nor a trader, and that there is no intent to invade any Federal field. A more accurate statement of the question presented would be: "Does the California statute transgress any limitations on the power of states to regulate succession and testamentary disposition of property within its borders?"

There are certain basic principles of importance here which are well recognized. In *Irving Trust Co. v. Day*, 314 U. S. 556, the Supreme Court had this to say (at p. 562):

"Rights of succession to the property of a deceased, whether by will or by intestacy, are of statutory creation, and the dead hand rules succession only by sufferance. Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction. (Citing cases.)"

In *Lyeth v. Hoey*, 305 U.S. 188, the opinion of Mr. Chief Justice Hughes states as follows (at p. 193):

"Undoubtedly the state law determines what persons are qualified to inherit property within the jurisdiction. Mager v. Grima, 8 How. 490, 493; Maxwell v. Bugbee, 250 U. S. 525, 536. The local law determines the right to make a testamentary disposition of such property and the conditions essential to the validity of wills, and the state courts settle their construction. Uterhart v. United States, 240 U. S. 598, 603. The State establishes the procedure governing the probate of wills and the processes of administration. Petitioner's status as heir was thus determined by the law of Massachusetts. That law also regulated the procedure by which his rights as an heir could be vindicated."

It was held in *Terrace v. Thompson*, 263 U. S. 197, 217, that "each state, in the absence of any treaty provision to the contrary, has power to deny to aliens the right to own land within its borders." (It is apparently conceded by the Custodian (Pet. Br. p. 71) that under this authority California may deny all aliens the right to inherit.)

We take it that the foregoing principles are not disputed. It is our contention that the state in this instance is but legislating in its acknowledged province, with full

recognition and deference being accorded to treaty provisions and with no attempt being made to assume any external powers, both the purpose and effect of its statute being merely to regulate succession in the state. The California statute, by making reciprocal rights its base, predicates its rule upon the treaty provisions made by the Federal Government.

When this case was presented before the Circuit Court of Appeals the petitioner characterized the California statute one of "retribution or confiscation"—and thus an offender as invading the domain of federal power over foreign affairs. That court found no justification for any such characterization. [R. 71.] It is now said that the statute makes of the state a promoter, which seeks by invitation to trade or to negotiate inheritance rights. We submit that inferences of this sort do not affect the judicial determination of the basic questions involved. Is the state legislating within its province? The answer to this is well established by *Irving Trust Co. v. Day, supra.* In so doing does it transgress its jurisdiction by invading the field of foreign relations? In answer to this the petitioner relies upon the decision in *Hines v. Davidowitz,* 312 U. S. 52.

With the soundness of the decision in the *Hines v. Davidowitz* case there need be no disagreement. That there are considerations here which were not applicable in that case involving the registration of aliens is self-evident. There the power to legislate was a concurrent one. The state could legislate in the exercise of its police power, and the Federal Government's power was not subject to question. In that case the state did not possess power as here, in a field recognized, in the absence of treaty provisions, as its exclusive province. There the Federal Government had

enacted "a complete scheme of regulation." It had acted, moreover, with a view to protecting the personal liberties of law-abiding citizens by affording secrecy to the information imparted upon registration,—a consideration important to foreign relations and one which was not respected in the provisions of the state statute. The Pennsylvania law impinged upon an over-all national policy, to which, although there had been a concurrent power to legislate, it must yield. Here we have no infringement of personal freedoms. We have a regulation of property rights within all acknowledged province. And, in the absence of treaty provisions, there is no other authority to legislate in this field.

In effect the state law but reaffirms and substantiates the treaty. No conflict of any kind can be pointed to. Nor can it be said, we submit, that the statute imposed any obstacle to complete Federal regulation in the field of foreign affairs.

Petitioner would have the state completely abolish all rights of aliens in those countries with which we have no treaty to inherit property here—rather than extend them such a right (and thereby enable our citizens to enjoy a like right) in those instances where those countries have adopted statutory provisions for reciprocal rights. This, he concedes, could be done,—but it is his contention that anything short of this would constitute an adventure in the field of foreign relationships. We think such a position results in a distortion of the effect of a state's legislation as to matters concerning which the state only has the power to legislate. It magnifies what is purely incidental.

We submit that the California statute does not bring about any invasion of the Federal field of foreign affairs.

IV.

The Burden of Proof of the Existence of Reciprocal Rights Is Upon the Custodian.

Petitioner claims that the Circuit Court erred in holding that the Custodian has the burden of proof. His contention is that the amendment of Section 259 of the California Probate Code controls. The California statute, both as enacted in 1941 and as amended in 1945, is contained in the Appendix hereto. [B and C, pp. 2 and 3.]

As originally enacted in 1941 the statute added three new sections to the Probate Code. Section 259 provided for the rights of nonresident aliens to take property by succession or testamentary disposition in California where reciprocal rights existed. Section 259.1 placed the burden of establishing the fact of existence of reciprocal rights upon the nonresident aliens. Section 259.2 provided that if reciprocal rights were not found to exist and if no heirs other than the aliens were found eligible to take, the property shall be disposed of as escheated property, *i. e.*, to the state.

By the amendment of 1945 (Chap. 1160, Stats. 1945) Sections 259.1 and 259.2 were repealed and Section 259 was amended by setting up a presumption that reciprocal rights exist and placing the burden of establishing the nonexistence of such rights upon the resident claimant. This amendment became effective on September 15, 1945, which was after the first decision of the Circuit Court in the instant case but before the decision of the United States Supreme Court of January 7, 1946, on the jurisdictional question. The judgment of the District Court was a summary judgment. (Opinion dated November 17, 1943.) (52 F. Supp. 850.)

The Custodian has not denied that he stands in the shoes of the nonresident alien legatees in this case. Whatever interest he could have acquired was that which these legatees may acquire. At the time the matter was submitted in the District Court the California statute required the nonresident aliens to establish the fact that reciprocal rights existed. This was never established.

Petitioner takes the position that the amended section is the one controlling and that, because a presumption that reciprocal rights is thereby provided, there is no burden upon him to establish this; that the burden is upon the other claimants to overcome the presumption by proving the nonexistence of reciprocal rights.

We submit that the Circuit Court was correct in treating the 1941 statute as controlling in this case. The stage at which such a change of procedural law could become effective in this case was passed long before the enactment of the amendment. Petitioner has cited no California case in which a changed procedural provision was invoked and held to govern where the stage at which the provision would have been operative had passed. The rule in California is to the contrary, as is well demonstrated by the decision in *Vanderbilt v. All Persons*, 163 Cal. 507, a case cited by the respondents. There, as here, the attempt was made to invoke a changed procedural provision after judgment; when the case was on appeal. At the time of trial of this quiet title action an abstract of title, made and certified after the public records had been destroyed by fire, was received in evidence, although at that time such evidence was not admissible. The California Code of Civil Procedure (Sec. 1855a) was afterwards, during pendency of the appeal, amended to permit

the introduction of such evidence. Answering the argument of respondent in that case that the amendment, being procedural, controlled and cured any error in the admission of this evidence, the California Supreme Court held that the changed law could not govern at that stage. The case of *Barnaby v. Barnaby*, 100 Cal. App. 195 is directly in point on this question,—the plaintiff there relying upon an amendment adopted during the pendency of the appeal to save her from the consequences of her failure to prove matters of which proof at the time of trial was required but as to which the amendment, made subsequently to the trial, permitted the court to take judicial notice. It was held that the amendment could not be invoked as effective at the appellate stage.

In the case here the Custodian chose to rely upon his claim that the California statute was unconstitutional, and offered no proof as to the existence of reciprocal rights of succession and testamentary disposition—although the burden was upon those in whose shoes he stood to establish this. As a consequence, reliance may not now be placed upon an amendment adopted after this stage of the case had passed.

In addition to this foreclosure of petitioner's claim we believe that there is another reason why he may not resort to the amended section 259 to escape the burden of proof. While respondents have not advanced the point, it appears to us that the 1945 statute went further than a procedural change. The revisions enacted partake of a substantive character. It is clear that they changed the reciprocal bases upon which the right to take property in California was extended to nonresident aliens. However, as this subject has not been argued by the parties here it may not be proper for us to inject it.

We submit that the Circuit Court's decision comports with California law and that the burden of proof was upon the Custodian.

Conclusion.

For the reasons herein expressed, the judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

FRED N. HOWSER,
Attorney General of the State of California;

EVERETT W. MATTOON,
Deputy Attorney General of the State of California,

Amici Curiae.

April 7, 1947.

APPENDIX.

A.

Article IV of the Treaty of Friendship, Commerce and Consular Rights, signed December 8, 1923, proclaimed October 14, 1925, provides as follows, 44 Stat. 2132, 2135:

"Where on the death of any person holding real or other immovable property or interests therein within the territories of one High Contracting Party, such property or interests therein would, by the laws of the country or by a testamentary disposition, descend or pass to a national of the other High Contracting Party, whether resident or non-resident, were he not disqualified by the laws of the country where such property or interests therein is or are situated, such national shall be allowed a term of three years in which to sell the same, this term to be reasonably prolonged if circumstances render it necessary, and withdraw the proceeds thereof, without restraint or interference, and exempt from any succession, probate or administrative duties or charges other than those which may be imposed in like cases upon the nationals of the country from which such proceeds may be drawn.

"Nationals of either High Contracting Party may have full power to dispose of their personal property of every kind within the territories of the other, by testament, donation, or otherwise, and their heirs, legatees and donees, of whatsoever nationality whether resident or nonresident, shall succeed to such personal property, and may take possession thereof, either by themselves or by others acting for them, and retain or dispose of the same at their pleasure subject to the payment of such duties or charges only as the nationals of the High Contracting Party within whose territories such property may be or belong shall be liable to pay in like cases."

B.

Section 259, 259.1 and 259.2 of the California Probate Code, as enacted by Chapter 895, California Statutes 1941, effective July 1, 1941, provide as follows:

"259. Aliens residing abroad: Dependence of rights upon reciprocity.

The rights of aliens not residing within the United States or its territories to take either real or personal property or the proceeds thereof in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take real and personal property and the proceeds thereof upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are inhabitants and citizens and upon the rights of citizens of the United States to receive by payment to them within the United States or its territories money originating from the estates of persons dying within such foreign countries.

"259.1. Same: Burden of establishing that rights are reciprocal. The burden shall be upon such nonresident aliens to establish the fact of existence of the reciprocal rights set forth in Section 259.

"259.2. Same: Disposition of property on finding of non-reciprocity. If such reciprocal rights are not found to exist and if no heirs other than such aliens are found eligible to take such property, the property shall be disposed of as escheated property."

C.

Section 259 of the California Probate Code, as amended by Chapter 1160, California Statutes 1945, effective September 15, 1945, provides as follows (Sections 259.1 and 259.2 were repealed by this Chapter):

"The right of aliens not residing within the United States or its territories to take real property in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take real property upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are residents and the right of aliens not residing in the United States or its territories to take personal property in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take personal property upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are residents. It shall be presumed that such reciprocal rights exist and this presumption shall be conclusive unless prior to the hearing on any petition for distribution of all or a portion of such property to an alien heir, devisee or legatee not residing within the United States or its territories a petition is filed by any person interested in the estate requesting the

court to find that either one or both of such reciprocal rights does not or do not exist as to the country of which such alien heir, devisee or legatee is resident. Upon the hearing of such petition the burden of establishing the nonexistence of such reciprocal right or rights shall be upon the petitioner. Notice of such hearing shall be given in the manner provided by Section 1200 of this code."

D.

Section 5(b) of the Trading with the Enemy Act, as amended by Section 301, Title III, First War Powers Act, 1941, 55 Stat. 839, 50 U. S. C. App., Supp. V. 5(b), provides in pertinent part as follows:

"(1) During the time of war or during any other period of national emergency declared by the President . . . any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; . . ."

SUPREME COURT OF THE UNITED STATES

No. 626.—October Term, 1946.

Tom C. Clark, Attorney General, as Successor to The Alien Property Custodian, Petitioner, *v.* Alvina Allen, Gertrude Dinwiddie, Hilda Pigozzi, et al.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[June 9, 1947.]

Mr. Justice Douglas delivered the opinion of the Court.

Alvina Wagner, a resident of California, died in 1942, leaving real and personal property situate there. By a will dated December 23, 1941, and admitted to probate in a California court in 1942, she bequeathed her entire estate to four relatives who are nationals and residents of Germany. Six heirs-at-law, residents of California, filed a petition for determination of heirship in the probate proceedings claiming that the German nationals were ineligible as legatees under California law.[1]

There has never been a hearing on that petition. For in 1943 the Alien Property Custodian, to whose functions

[1] Section 259, California Probate Code, in 1942 provided:

"The rights of aliens not residing within the United States or its territories to take either real or personal property or the proceeds thereof in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take real and personal property and the proceeds thereof upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are inhabitants and citizens and upon the rights of citizens of the United States to receive by payment to them within

the Attorney General has recently succeeded,[2] vested in himself all right, title and interest of the German nationals in the estate of this decedent.[3] He thereupon instituted this action in the District Court against the executor under the will and the California heirs-at-law for a determination that they had no interest in the estate and that he was entitled to the entire net estate, after payment of administration and other expenses. The District Court granted judgment for the Custodian on the pleadings. 52 F. Supp. 850. The Circuit Court of Appeals reversed, holding that the District Court was without jurisdiction of the subject matter. 147 F. 2d 136. The case came here on certiorari. We held that the District Court had jurisdiction of the suit and remanded the cause to the Circuit Court of Appeals for consideration of the merits. 326 U. S. 490. The Circuit Court of Appeals thereupon held for respondents. 156 F. 2d 653. The case is here again on a petition for a writ of certiorari which we granted because the issues raised are of national importance.

First. Our problem starts with the Treaty of Friendship, Commerce and Consular Rights with Germany,

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the United States or its territories money originating from the estates of persons dying within such foreign countries."

Section 259.2 provided:

"If such reciprocal rights are not found to exist and if no heirs other than such aliens are found eligible to take such property, the property shall be disposed of as escheated property."

The condition with respect to receipt of moneys in the United States was repealed in 1945, while this case was pending. Cal. Stats. 1945, c. 1160, § 1, effective September 15, 1945. Under the original act, the non-resident aliens had the burden of establishing the fact of existence of the reciprocal rights. § 259.1. By the 1945 amendment the burden of establishing the non-existence of such reciprocal right was placed on him who challenged the right of the non-resident aliens to take. Section 259.2 was repealed.

[2] Exec. Order No. 9788, Oct. 15, 1946, 11 Fed. Reg. 11981.

[3] Vesting Order No. 762, 8 Fed. Reg. 1252.

signed December 8, 1923, and proclaimed October 14, 1925. 44 Stat. 2132. It has different provisions governing the testamentary disposition of realty and personalty, which we will treat separately. The one pertaining to realty, contained in Article IV, reads as follows:

> "Where, on the death of any person holding real or other immovable property or interests therein within the territories of one High Contracting Party, such property or interests therein would, by the laws of the country or by a testamentary disposition, descend or pass to a national of the other High Contracting Party, whether resident or non-resident, were he not disqualified by the laws of the country where such property or interests therein is or are situated, such national shall be allowed a term of three years in which to sell the same, this term to be reasonably prolonged if circumstances render it necessary, and withdraw the proceeds thereof, without restraint or interference, and exempt from any succession, probate or administrative duties or charges other than those which may be imposed in like cases upon the nationals of the country from which such proceeds may be drawn."

The rights secured are in terms a right to sell within a specified time plus a right to withdraw the proceeds and an exemption from discriminatory taxation. It is plain that those rights extend to the German heirs of "any person" holding realty in the United States. And though they are not expressed in terms of ownership or the right to inherit, that is their import and meaning. *Techt* v. *Hughes*, 229 N. Y. 222, 240, 128 N. E. 185, 191; *Ahrens* v. *Ahrens*, 144 Ia. 486, 489, 123 N. W. 164, 166. And see *People* v. *Gerke*, 5 Cal. 381; *Scharpf* v. *Schmidt*, 172 Ill. 255, 50 N. E. 182; *Colson* v. *Carlson*, 116 Kan. 593, 227 P. 360; *Goos* v. *Brocks*, 117 Neb. 750, 223 N. W. 13.

If, therefore, the provisions of the treaty have not been superseded or abrogated, they prevail over any requirements of California law which conflict with them. *Hauenstein* v. *Lynham*, 100 U. S. 483, 488–490.

Second. The Circuit Court of Appeals concluded that these provisions of the treaty had been abrogated. It relied for that conclusion on the Trading with the Enemy Act, 40 Stat. 411, 50 U. S. C. App. § 1 *et seq.*, as amended by the First War Powers Act, 55 Stat. 839, 50 U. S. C. App. Supp. I, § 5, and the Treaty of Berlin, 42 Stat. 1939.

We start from the premise that the outbreak of war does not necessarily suspend or abrogate treaty provisions. *Society for the Propagation of the Gospel* v. *New Haven*, 8 Wheat. 464, 494–495. There may of course be such an incompatibility between a particular treaty provision and the maintenance of a state of war as to make clear that it should not be enforced. *Karnuth* v. *United States*, 279 U. S. 231. Or the Chief Executive or the Congress may have formulated a national policy quite inconsistent with the enforcement of a treaty in whole or in part. This was the view stated in *Techt* v. *Hughes*, *supra*, and we believe it to be the correct one. That case concerned the right of a resident alien enemy to inherit real property in New York. Under New York law, as it then stood, an alien enemy had no such right. The question was whether the right was granted by a reciprocal inheritance provision in a treaty with Austria which was couched in terms practically identical with those we have here. The court found nothing incompatible with national policy in permitting the resident alien enemy to have the right of inheritance granted by the treaty. Cardozo, J., speaking for the court, stated the applicable principles as follows:

> "The question is not what states *may* do after war has supervened, and this without breach of their duty as members of the society of nations. The question is what courts are to presume that they have

done. . . . President and senate may denounce the treaty, and thus terminate its life. Congress may enact an inconsistent rule, which will control the action of the courts (*Fong Yue Ting* v. *United States*, 149 U. S. 698). The treaty of peace itself may set up new relations, and terminate earlier compacts either tacitly or expressly. . . . But until some one of these things is done, until some one of these events occurs, while war is still flagrant, and the will of the political departments of the government unrevealed, the courts, as I view their function, play a humbler and more cautious part. It is not for them to denounce treaties generally, *en bloc*. Their part it is, as one provision or another is involved in some actual controversy before them, to determine whether, alone, or by force of connection with an inseparable scheme, the provision is inconsistent with the policy or safety of the nation in the emergency of war, and hence presumably intended to be limited to times of peace. The mere fact that other portions of the treaty are suspended or even abrogated is not conclusive. The treaty does not fall in its entirety unless it has the character of an indivisible act." 229 N. Y. pp. 242–243.

To the same effect see *Goos* v. *Brocks*, *supra*; *State* v. *Reardon*, 120 Kan. 614, 245 P. 158.[4]

We do not think that the national policy expressed in the Trading with the Enemy Act, as amended, is incompatible with the right of inheritance granted German aliens under Article IV of the treaty. It is true that since the declaration of war on December 11, 1941 (55 Stat. 796), the Act and the Executive Orders issued thereunder have prohibited the entry of German nationals into this

[4] For a recent review of the authorities see Lenoir, The Effect of War on Bilateral Treaties, 34 Geo. L. J. 129.

country,[5] have outlawed communications or transactions of a commercial character with them,[6] and have precluded the removal of money or property from this country for their use or account.[7] We assume that these provisions abrogate the parts of Article IV of the treaty dealing with the liquidation of the inheritance and the withdrawal of the proceeds, even though the Act provides that the prohibited activities and transactions may be licensed.[8] But the Act and the Executive Orders do not evince such hostility to ownership of property by alien enemies as to imply that its acquisition conflicts with the national policy. There is, indeed, tacit recognition that acquisition of property by inheritance is compatible with the scheme of the Act. For the custodian is expressly empowered to represent the alien enemy heir in all legal proceedings, including those incident to succession.[9] Much reliance for the contrary view is placed on the power to vest alien property in an agency of the United States.[10] But the power to vest, *i. e.*, to take away, what may be owned or acquired does not reveal a policy at odds with the reciprocal right to inherit granted by Article

[5] § 3 (b).

[6] § 3 (a).

[7] § 7 (c); § 5 (b), as amended; Exec. Order No. 8785, 3 C. F. R. Cum. Supp. 948.

[8] § 5 (a).

[9] Exec. Order No. 9193, ¶ 5, 3 C. F. R. Cum. Supp. 1174, 1176.

[10] Section 5 (b) (1), as amended, provides in part:

"During the time of war or during any other period of national emergency declared by the President . . . any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes. . . ."

IV of the treaty. For the power to vest is discretionary not mandatory. The loss of the inheritance by vesting is, therefore, not inevitable. But more important, vesting does not necessarily deprive the alien enemy of all the benefits of his inheritance. If he owes money to American creditors, the property will be applied to the payment of his debts.[11]

To give the power to vest the effect which respondents urge would, indeed, prove too much. That power is not restricted to property of alien enemies. It extends to the property of nationals of any foreign country, friend or enemy.[12] Provisions comparable to that contained in Article IV of the present treaty are found in existing treaties with friendly nations.[13] We will not readily assume that when Congress enacted § 5 (b) and authorized the vesting of property, it had a purpose to abrogate all such treaty clauses. Cf. *Cook* v. *United States*, 288 U. S. 102, 120. Yet if the power to vest is inconsistent with the right of inheritance of an alien enemy, it is difficult to see why it is any less so when other aliens are involved. Finally, there is a distinction between the acquisition of property and the use thereof which § 5 (b) itself recognizes. That section not only grants the President the power to vest; it likewise grants him authority under the same circumstances to "prevent or prohibit, any acquisition . . . of . . . any property in which any foreign country or a national thereof has any interest." § 5 (b) (1) (B). No action has been taken to prevent or prohibit the acquisition of property by inheritance on the part of enemy aliens. The grant of express power to cut off, *inter alia*, the right of inheritance and the non-exercise of the power lend support to the view that the Trading with the Enemy

[11] Pub. L. No. 671, 79th Cong., 2d Sess., adding § 34 to the Trading with the Enemy Act.

[12] See note 10, *supra*.

[13] Treaty with Great Britain, Art. I, II, March 2, 1899, 31 Stat. 1939. Treaty with Norway, Art. IV, June 5, 1928, 47 Stat. 2135, 2138.

Act, as amended, did not without more suspend or abrogate Article IV of the present treaty. This conclusion squares with the general rule stated in *Karnuth* v. *United States*, *supra*, p. 237, that treaty provisions "giving the right to citizens or subjects of one of the high contracting powers to continue to hold and transmit land in the territory of the other" survive the outbreak of war.

The argument based on the Treaty of Berlin is inconclusive. The Joint Resolution of July 2, 1921, 42 Stat. 105, 106, declared that property of German nationals held by the United States should be retained and no disposition made of it, except as specifically provided by law, until the German government made suitable provision for the satisfaction of claims of American nationals against it. Thus absolute title to the property in question became vested in the United States. *Cummings* v. *Deutsche Bank*, 300 U. S. 115. The Treaty of Berlin accorded the United States all rights and advantages specified in the resolution. But the Treaty of 1828 with Prussia contained a provision substantially similar to Article IV of the present treaty. 8 Stat. 378, 384, Art. XIV. Hence it is argued that if the Treaty of 1828 survived the outbreak of war and thus guaranteed property rights in German nationals by way of inheritance during that war, it would not have been necessary to have negotiated a new convention covering the same ground in 1923. And it is also argued that if the provision in the earlier treaty did not survive the war, it is unlikely that the same parties would intend like provisions in the later treaty to have a different effect.

The attitude of the State Department has varied. In 1918 Secretary Lansing expressed the view that such treaty provisions were not in force during the war with Germany and Austria.[14] Today the Department apparently takes

[14] U. S. Foreign Rel.: 1918 Supp. 2, p. 309 (Dept. State 1933); VI Hackworth, Digest of International Law (1943) p. 327.

the other view.[15] We have no reliable evidence of the intention of the high contracting parties outside the words of the present treaty. The attitude and conduct under earlier treaties, reflecting as they did numerous contingencies and conditions, leave no sure guide to the construction of the present treaty. Where the relevant historical sources and the instrument itself give no plain indication that it is to become inoperative in whole or in part on the outbreak of war, we are left to determine, as *Techt* v. *Hughes, supra,* indicates, whether the provision under which rights are asserted is incompatible with national policy in time of war. So far as the right of inheritance of realty under Article IV of the present treaty is concerned, we find no incompatibility with national policy, for reasons already given.

It is argued, however, that the Treaty of 1923 with Germany must be held to have failed to survive the war, since Germany, as a result of its defeat and the occupation by the Allies, has ceased to exist as an independent national or international community. But the question whether a state is in a position to perform its treaty obligations is essentially a political question. *Terlinden* v. *Ames,* 184 U. S. 270, 288. We find no evidence that the political departments have considered the collapse and surrender of Germany as putting an end to such provisions of the treaty as survived the outbreak of the war or the obligation of either party in respect to them. The Allied Control Council has, indeed, assumed control of Germany's foreign affairs and treaty obligations[16]—a policy and course of conduct by the political departments wholly consistent with the maintenance and enforcement, rather than the repudiation, of pre-existing treaties.

[15] Letter to the Attorney General from Acting Secretary of State, Joseph C. Grew, dated May 21, 1945, commenting on the Government's position in the present litigation.

[16] The Axis in Defeat, State Dept. Pub. No. 2423, pp. 71, 72, 77.

Third. The problem of the personalty raises distinct questions. Article IV of the treaty contains the following provision pertaining to it:

> "Nationals of either High Contracting Party may have full power to dispose of their personal property of every kind within the territories of the other, by testament, donation, or otherwise, and their heirs, legatees and donees, of whatsoever nationality, whether resident or non-resident, shall succeed to such personal property, and may take possession thereof, either by themselves or by others acting for them, and retain or dispose of the same at their pleasure subject to the payment of such duties or charges only as the nationals of the High Contracting Party within whose territories such property may be or belong shall be liable to pay in like cases."

A practically identical provision of the Treaty of 1844 with Wurttemberg, Art. III, 8 Stat. 588, 590, was before the Court in *Frederickson* v. *Louisiana*, 23 How. 445. In that case the testator was a citizen of the United States, his legatees being citizens and residents of Wurttemberg. Louisiana, where the testator was domiciled, levied a succession tax of 10 per cent on legatees not domiciled in the United States. The Court held that the treaty did not cover the "case of a citizen or subject of the respective countries residing at home, and disposing of property there in favor of a citizen or subject of the other . . ." pp. 447–448. That decision was made in 1860. In 1917 the Court followed it in cases involving three other treaties. *Petersen* v. *Iowa*, 245 U. S. 170; *Duus* v. *Brown*, 245 U. S. 176; *Skarderud* v. *Tax Commission*, 245 U. S. 633.

The construction adopted by those cases is, to say the least, permissible when the syntax of the sentences dealing with realty and personalty is considered. So far as realty is concerned, the testator includes "any person"; and the property covered is that within the territory of either of

the high contracting parties. In case of personalty, the provision governs the right of "nationals" of either contracting party to dispose of their property within the territory of the "other" contracting party; and it is "such personal property" that the "heirs, legatees and donees" are entitled to take.

Petitioner, however, presents a detailed account of the history of the clause which was not before the Court in *Frederickson* v. *Louisiana, supra,* and which bears out the construction that it grants the foreign heir the right to succeed to his inheritance or the proceeds thereof. But we do not stop to review that history. For the consistent judicial construction of the language since 1880 has given it a character which the treaty-making agencies have not seen fit to alter. And that construction is entirely consistent with the plain language of the treaty. We therefore do not deem it appropriate to change that construction at this late date, even though as an original matter the other view might have much to commend it.

We accordingly hold that Article IV of the treaty does not cover personalty located in this country and which an American citizen undertakes to leave to German nationals. We do not know from the present record the nationality of Alvina Wagner. But since the issue arises on the Government's motion for judgment on the pleadings, we proceed on the assumption less favorable to it, viz., that she was an American citizen.

Fourth. It is argued, however, that even though the provision of the treaty is inapplicable, the personalty may not be disposed of pursuant to the California statute because that statute is unconstitutional. Issues under the Fourteenth Amendment are not raised as in *Terrace* v. *Thompson,* 263 U. S. 197. The challenge to the statute is that it is an extension of state power into the field of foreign affairs, which is exclusively reserved by the Constitution to the Federal Government. That argument is

based on the fact that under the statute the right of nonresident aliens to take by succession or testamentary disposition is dependent upon the existence of a reciprocal right on the part of citizens of the United States to take personalty on the same terms and conditions as residents and citizens of the other nation.[17] The argument is that by this method California seeks to promote the right of American citizens to inherit abroad by offering to aliens reciprocal rights of inheritance in California. Such an offer of reciprocal arrangements is said to be a matter for settlement by the Federal Government on a nation-wide basis.

In *Blythe* v. *Hinckley*, 180 U. S. 333, California had granted aliens an unqualified right to inherit property within its borders. The alien claimant was a citizen of Great Britain with whom the United States had no treaty providing for inheritance by aliens in this country. The argument was that a grant of rights to aliens by a State was, in absence of a treaty, a forbidden entry into foreign affairs. The Court rejected the argument as being an extraordinary one. The objection to the present statute is equally far fetched.

Rights of succession to property are determined by local law. See *Lyeth* v. *Hoey*, 305 U. S. 188, 193; *Irving Trust Co.* v. *Day*, 314 U. S. 556, 562. Those rights may be affected by an overriding federal policy, as where a treaty makes different or conflicting arrangements. *Hauenstein* v. *Lynham*, *supra*. Then the state policy must give way. Cf. *Hines* v. *Davidowitz*, 312 U. S. 52. But here there is no treaty governing the rights of succession to the personal property. Nor has California entered the forbidden domain of negotiating with a foreign country, *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 316–17, or making a compact with it contrary to the prohibition of Article I, Section 10 of the Constitution. What Cali-

[17] See note 1, *supra*.

fornia has done will have some incidental or indirect effect in foreign countries. But that is true of many state laws which none would claim cross the forbidden line.

In summary, we hold that disposition of the realty is governed by Article IV of the treaty. Disposition of the personalty, however, is not governed by the treaty unless it is determined that Alvina Wagner was a German national. If she was an American citizen, disposition of the personalty is governed by California law. Whether there are other requirements of the California statute which would bar the California heirs-at-law is a question on which we intimate no opinion.

The judgment is reversed in part and affirmed in part, and the cause is remanded to the District Court for proceedings in conformity with this opinion.

So ordered.

SUPREME COURT OF THE UNITED STATES

No. 626.—October Term, 1946.

Tom C. Clark, Attorney General, as Successor to The Alien Property Custodian, Petitioner,

v.

Alvina Allen, Gertrude Dinwiddie, Hilda Pigozzi, et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[June 9, 1947.]

Mr. Justice Rutledge, concurring in part.

I join in the Court's opinion insofar as it relates to the real estate. But, as to the personal property, I think the cause should be remanded to the District Court for determination of Alvina Wagner's nationality, without expression of opinion here upon the constitutionality of the California statute.

The decision now made on that issue, by virtue of the Court's hypothesizing that she was an American citizen, will be rendered both moot and advisory in character if it is found, as it may well be in the District Court's further proceedings, that she was a German national. This Court has consistently declined to decide constitutional questions on hypothetical presentations. *Rescue Army* v. *Municipal Court*, 331 U. S. ——. The practice should be followed in this case, even though conceivably another appeal might be saved by indulging the presumption which the Court makes. It is more important that constitutional decisions be reserved until the issues calling for them are squarely and inescapably presented, factually as well as legally, than it is to expedite the termination of litigation or the procedural convenience of the parties.